

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF YAVAPAI

3 STATE OF ARIZONA, )

4 Plaintiff, )

5 vs. )

6 STEVEN CARROLL DEMOCKER, )

7 Defendant. )  
8  
9

FILED

9 O'Clock

M

JAN 28 2010

JEANNE HICKS, Clerk

BY MARY RYAN  
Deputy

No. CR 2008-1339

10  
11 BEFORE:

THE HONORABLE THOMAS B. LINDBERG  
JUDGE OF THE SUPERIOR COURT  
DIVISION 6  
YAVAPAI COUNTY, ARIZONA

12  
13  
14 PRESCOTT, ARIZONA  
FRIDAY, JANUARY 15, 2010  
15 9:47 A.M. SESSION

16  
17 REPORTER'S TRANSCRIPT ON PROCEEDINGS

18  
19 Hearing on Motions  
20 Motion To Exclude Prior Act Evidence  
21 Motion Re: Photos

22  
23 LISA A. CHANEY, RPR, CSR, CR  
24 Certified Reporter  
25 Certificate No. 50801

ORIGINAL

LISA A. CHANEY, CR, RPR  
CERTIFIED REPORTER

January 15, 2010  
9:37 A.M.

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER, DEPUTY.  
ALSO PRESENT: MS. DEB COWELL, PARALEGAL.  
FOR THE DEFENDANT: MR. JOHN SEARS, AND  
MS. ANNE CHAPMAN.

THE COURT: Continuing with State versus  
Steven DeMocker, CR 2008-1339. Mr. DeMocker is present  
with Ms. Chapman, Mr. Sears representing him. Mr. Bunter  
is here from the county attorney's office representing the  
State.

I had a chance to meet with the lawyers and  
then the lawyers had a chance to meet with each other  
regarding some of the remaining issues. I think where we  
left off is in connection with the 404(B) motion and the  
last item on that that was still remaining is Number 6.

MR. SEARS: Thank you, Your Honor. Your  
Honor, the last category of potential 404(B) evidence  
that's been identified that hasn't been talked about yet  
is whether the State should be allowed to present as  
404(B) prior act evidence.

What you have heard about that they claim  
constitutes evidence of a plan to flee the jurisdiction  
prior to his arrest between the time of Miss Kennedy's  
death on July 2nd and his arrest on October 23rd.

And to recap the principal portion of that

1 evidence consists of some books that Mr. DeMocker ordered  
2 over the internet dealing generally with topics about how  
3 to hide your identity. How to be an international  
4 fugitive and, in fact, the Court may have taken an  
5 opportunity to scan some of those. We brought some to  
6 Court at a prior hearing.

7           The State also has evidence that Mr. DeMocker  
8 had at the time of his arrest at his apartment in  
9 Scottsdale a motorcycle and some camping gear, GPS maps,  
10 and similar items and the State has wired all of that  
11 together in this with some statements from other people  
12 who claimed to have some information from Mr. DeMocker  
13 about what he was planning to do to say that he was  
14 planning to flee.

15           And apparently the argument that they would  
16 make, since he obviously didn't flee, on the day he was  
17 arrested he was sitting at his desk at work where he was  
18 expected to be. Our expectation is, the reason we filed  
19 this motion is that the State at some point in time will  
20 try to argue that only a guilty person would make these  
21 plans and do these things and that it is evidence of his  
22 consciousness of his own guilt in this case.

23           If you look at 404(B) no where in the  
24 exceptions to the general rule that such acts are  
25 inadmissible is something called consciousness of guilt.

1 The State may argue that its part of some evidence of plan  
2 or knowledge or absent of mistake or accident, but the  
3 fact is what they really want to do with this evidence is  
4 to infer from circumstances that Mr. DeMocker must be  
5 guilty and that because he was doing these things, it  
6 means and can only mean, that he was doing these things  
7 because he knew that he needed to get away before he was  
8 apprehended.

9           And you'll also remember that we've had  
10 evidence in this case that a relatively short period of  
11 time before Mr. DeMocker was arrested an article appeared  
12 in the Prescott Courier that seemingly was planted by the  
13 sheriff's office indicating that according to the sheriff  
14 himself that an arrest was eminent in this, at that time  
15 point an unsolved homicide case and that they were waiting  
16 for the result of one blood test and when that came in an  
17 arrest would be made.

18           It seems to us and did at the time that  
19 knowing that the only likely suspect was Mr. DeMocker at  
20 that point in time that this was an effort to spook  
21 Mr. DeMocker into running, and it certainly didn't. As we  
22 pointed out in hearings before you on our motion for  
23 modification of release conditions, in fact, Mr. DeMocker  
24 stayed put and was exactly where every one expected him to  
25 be on the day he was arrested.

1           Mr. DeMocker also made some statements to the  
2 police on October 23rd after he was arrested when asked  
3 directly about these books and said, in essence, that it  
4 was stupid and fear based on his part.

5           So you have this evidence and you have the way  
6 the State wants to use it. There is also circling around  
7 the possibility that the State might ask this Court to  
8 instruct the jury about both consciousness of guilt and/or  
9 flight or concealment. Well, since there was no flight or  
10 concealment, I don't think they would ever be entitled as  
11 a matter of law to an instruction on that.

12           On the other hand, the State if not  
13 restrained pursuant to Rule 404(B) would simply throw this  
14 out of their case in chief as one more of this never  
15 ending list of things that they have developed in their  
16 investigation that just is an attempt to show that  
17 Mr. DeMocker is a man of bad character and bad behavior.

18           And I want to be clear, again, as I tried to  
19 be yesterday, that we see a difference between the use of  
20 such evidence and such acts of the Defendant as  
21 impermissible character evidence against him and we are  
22 not suggesting that on some other theory the State might  
23 attempt to bring forth the same evidence.

24           A 404(B) motion is simply to ferret out,  
25 identify, and deal with what we think is clearly character

1 evidence, and if it's character evidence in the guise of  
2 something else, than the Court needs to make that  
3 determination here today, but we think that based on what  
4 we understand the evidence to be, and what we heard the  
5 State say both in writing in this case and through  
6 disclosure in hearings before this Court, is simply one  
7 more effort to dirty up Mr. DeMocker in the eyes of the  
8 jury.

9           And under 404(B) we see no such exception to  
10 this conduct that would allow it to come in on that theory  
11 and on another day, at another time, if the State has a  
12 different theory of admissibility of evidence, we'll take  
13 it up at that point. Thank you.

14           THE COURT: Mr. Butner.

15           MR. BUTNER: Well, Judge, this is not  
16 character evidence. The Defendant's admission that his  
17 actions in acquiring these materials, books, and food  
18 stuff and a motorcycle and so forth in preparation to  
19 flee, his admission that this was stupid and fear based,  
20 that's pretty accurate and that's exactly what it  
21 demonstrates is his knowledge.

22           His knowledge at the time that and his  
23 evidence of consciousness of guilt. Knowledge equals  
24 consciousness of guilt. That's what knowledge is,  
25 consciousness. You're aware of something. You know about

1 it. And this is very strong evidence that he knew he was  
2 guilty in this case and he was getting ready to flee on  
3 the basis of fear that he was going to get caught and the  
4 consequences that he could sustain as a result of that  
5 clearly demonstrates his intent to flee and this is  
6 entirely permissible evidence.

7 This is not 404(B) evidence. This is not  
8 character evidence. This is not evidence of other crimes.  
9 This is evidence of the crime that's before this tribunal  
10 at this point in time. Its evidence that this Defendant  
11 committed the crime. He knew he committed the crime and  
12 knew that he needed to get away in order to avoid the  
13 consequences of getting caught.

14 THE COURT: In terms of what you think of the  
15 evidence that this section of the motion is dealing with,  
16 if we might take up the ordering and delivery of books  
17 pertaining to issues of hiding identity.

18 MR. BUTNER: Correct.

19 THE COURT: Certain items on the computer as  
20 regard to that, in terms of the acts, the obtaining of a  
21 second passport.

22 MR. BUTNER: Correct.

23 THE COURT: The possession of motorcycle with  
24 the side bags that contained food stuff, GPS location map,  
25 having to do with the Republic of Mexico.

1 MR. BUTNER: Exactly.

2 THE COURT: The statements made with regard to  
3 what that stuff was for, that those are all items within  
4 the category you say evidence exists for that item,  
5 anything else that I have already heard that pertains to  
6 this category in general?

7 MR. BUTNER: There's evidence that he had a  
8 pistol right there with that stuff, a couple of clips, and  
9 also there's evidence that his daughter Charlott was  
10 concerned about this and had a -- a diary entry, I  
11 believe, or a letter, a written memorandum, so to speak,  
12 from Charlott concerning the fact that she was afraid that  
13 her dad was getting ready to leave and she knew that and  
14 this evidence, of course, is also I believe admissible for  
15 all of those kinds of things.

16 THE COURT: Anything else that you feel you  
17 need to refresh my memory of what this particular grouping  
18 is --

19 MR. BUTNER: I can't think of anything  
20 further.

21 THE COURT: -- offered?

22 MR. BUTNER: Of course, photos of all of those  
23 things.

24 THE COURT: Mr. Sears, any other items that  
25 you think would fit within the category that you're trying



1 to preclude?

2 MR. SEARS: No, that's a pretty descriptive  
3 list but I think that we need to try and remember, because  
4 it's been talked about in a number of different hearings,  
5 what the actual evidence presented by the State about  
6 these things are.

7 Beginning with the statements that  
8 Mr. DeMocker made when he was arrested. It was clear, and  
9 I think there is no dispute, that those statements were in  
10 response to questions about the books. The police were  
11 not questioning him about the motorcycle or the camping  
12 gear or the handgun or any of those other things.

13 The diary entry, the journal entry, in  
14 Mr. DeMocker's daughter's diary was dated August 17th of  
15 2008. Nine weeks later he's still in Arizona. The  
16 passport application we've heard a lot of about when  
17 Mr. Ainley had the case and that was done within a few  
18 days after.

19 THE COURT: Seizure of his original passport  
20 and other items?

21 MR. SEARS: At the time he was arrested. They  
22 had everything. They had his driver's license, credit  
23 card.

24 THE COURT: Vehicle --

25 MR. SEARS: All of those others things. There

1 was a question about whether he made a false statement in  
2 the application, as the Court has heard, but just the fact  
3 of applying for a passport in that context which the State  
4 did not dispute that he was doing those other things is  
5 something else.

6           The State ran -- did not seize for some reason  
7 but ran the serial number on the handgun and determined  
8 that Mr. DeMocker had owned that handgun for about ten  
9 years and was bought at Bucky O'Neil's gun shop here in  
10 Prescott and was lawfully possessed.

11           The motorcycle in question that Mr. DeMocker  
12 had was his means of transportation. Remember that the  
13 police took his automobile, which they still have all of  
14 these months later, leaving him with no transportation and  
15 Mr. DeMocker needed something to get around on and had a  
16 motorcycle.

17           The testimony about these facts to the extent  
18 that they are facts, is one thing. The problem that  
19 404(B) anticipates is the way in which it would be used  
20 and if the State wants to argue, as it would in their case  
21 in chief, that the constellation of circumstances here  
22 means that Mr. DeMocker was going to flee, not simply  
23 because he knew he was guilty, but because he was a  
24 continuing bad character, that would do something terrible  
25 and then, rather, than stand up and face whatever was

1 coming would run away, that's a separate character trait.  
2 Running away from trouble that has implications in the  
3 real world and we can't forget that what we're talking  
4 about is what the jury would hear and what would or would  
5 not be allowed to be argued to the jury.

6 And it is a particularly bad character trait,  
7 I would suggest for a jury to hear that somebody,  
8 particularly if they're innocent, as in this case, would  
9 run away and hide, rather than stand up and confront what  
10 was happening.

11 So that's the way in which we think 404(B) is  
12 implicated in this case. The other problem is that if  
13 the State is allowed to raise this and argue it, it puts  
14 additional pressure on Mr. DeMocker to waive his fifth  
15 amendment privilege and testify his own defense in this  
16 case because not doing that would make that argument in  
17 large part unrebutted and I understand that that can come  
18 up in a lot of different contexts but, particularly, if  
19 highly prejudicial information comes in in that purpose  
20 leaving Mr. DeMocker with the hostes choice of waiving his  
21 right and testifying to explain what he was really doing  
22 and thinking or asserting his privilege against not  
23 testifying is unfair.

24 Remember that for the 404(B) analysis we have  
25 to prove by clear and convincing evidence this these acts

1 occurred, have to determine whether or not they fit within  
2 any of the 404(B) exceptions, but then, they have to be  
3 relevant and they have to be free from the kind of unfair  
4 prejudice to the Defendant that Rule 403 discusses and I  
5 think that even if you hopscotch your way through all of  
6 those other steps and end with the 403(B) analysis, that's  
7 the principal prejudice to Mr. DeMocker.

8           It allows the State to circulate a theory in  
9 this case of highly prejudicial information to dirty up  
10 Mr. DeMocker and leaving him with very few options about  
11 how to respond to it because these are so personal to him  
12 there's really no one else that can speak to what  
13 Mr. DeMocker was thinking and planning other than  
14 Mr. DeMocker and, of course, the constitution protects him  
15 from having to do that in this case.

16           So I think that when you analyze this  
17 evidence with that lens of 404(B) and what this is really  
18 being offered for, that's the problem.

19           THE COURT: I think that I interrupted your  
20 argument, Mr. Butner, in asking a question about what  
21 other items of evidence or prior testimony are implicated  
22 by this, so if we could get back to you.

23           MR. BUTNER: Judge, just to kind of clarify  
24 the gun that he had, the gun was right there with all of  
25 the stuff ready to go apparently to Mexico with the GPS

1 devices and he also had a rented car. This wasn't his  
2 sole form of transportation, this motorcycle. So that's  
3 -- basically those are the facts and the photographs of  
4 the acquisition of all of those things ready to go.

5 THE COURT: Okay. Any other argument that you  
6 want to make on this?

7 MR. BUTNER: No. No, that's sufficient, Your  
8 Honor. Thank you.

9 THE COURT: Any other summation that you want  
10 to give on the ones that I haven't made any decisions  
11 about so far? Obviously, we've had some degree of meeting  
12 of the minds or I've entered orders concerning some of the  
13 11 but as far as what remains, any summation that you want  
14 to give?

15 MR. SEARS: Very briefly, Your Honor. Item  
16 Number 3, the computer searches, as we indicated yesterday  
17 having moved through disclosure and hearings in this case  
18 it seems to us apparent now that any argument that the  
19 State might want to make that would somehow tie those  
20 computer searches to the way in which this killing  
21 actually took place, is improbable at best.

22 And if you subtract that improbability out of  
23 this equation what you're left with then is the simple  
24 fact that the State would like the jury to know that the  
25 Defendant in a vacuum was looking at this kind of

1 information.

2 It again puts the burden back on the Defendant  
3 to testify in his own defense, waive his fifth amendment  
4 privilege and explain what he was really looking at in  
5 this case. It's no longer relevant which is the middle  
6 prong of this analyst.

7 It's no longer relevant that he may have been  
8 looking at -- even if you give the State their theory  
9 which, of course, we're not prepared to do, but assuming  
10 for purposes of this argument, the State is correct that  
11 Mr. DeMocker was not researching a book, that he was  
12 interested in killing somebody, trying to connect that up  
13 this way to this crime with the disconnect that is created  
14 between what these searches are about and what they are  
15 not about and what happened to Carol Kennedy on July 2nd  
16 of 2008, just seems -- just seems to speak for itself.

17 It seems that the State would be hard pressed  
18 to make that argument. The State has said several times  
19 including yesterday that all of these computer searches  
20 mean that Mr. DeMocker is planning on killing somebody and  
21 it must then be Carol Kennedy and then abandons all --  
22 whatever his plan was in favor of killing her in her own  
23 home on an evening when no one would know who was present  
24 and who was coming over while she's speaking on the  
25 telephone to her mother with some sort of object that

1 created a blunt force trauma.

2 The difference between that and this  
3 supposedly planned and calculated thing is -- couldn't be  
4 more striking and you have rejected and removed from this  
5 case the cold and calculating argument in aggravation for  
6 penalty purposes, and I think for good reason, that one  
7 does not follow the other.

8 And when you do that and there's no reason for  
9 the State to argue that the only logical conclusion about  
10 their reason for using this evidence, is they just want  
11 the jury to know as many bad things about Mr. DeMocker as  
12 they can bring up.

13 THE COURT: Thank you. Any summation that you  
14 want to give on the remaining other act evidence?

15 MR. BUTNER: Judge, in regard to that computer  
16 search let me more clearly explain, I think, it's relevant  
17 because it demonstrates that the Defendant was thinking  
18 about killing someone and was looking for methods to do  
19 that without getting caught, that's what the gist of that  
20 research is.

21 And then a further review of that same  
22 research demonstrates that this wasn't for a book as the  
23 explanation has been offered but rather he has gone so far  
24 as to take the step of getting an employee identification  
25 number so that he could acquire the materials necessary in

1 order to do the killing.

2           What we have here is a plan to kill someone.  
3 We can't tell from what's in the computer as to exactly  
4 who the target is but then as events develop, a mere  
5 couple of months later, the financial pressure greatly  
6 increases and then Mr. DeMocker abandons that plan that he  
7 was researching to kill Carol Kennedy, and goes out and  
8 takes matters literally directly into his own hands and  
9 kills her on the evening of July the 2nd, 2008.

10           So he's planning to kill her, Judge, in one  
11 way and he ultimately changes his mind and kills her in a  
12 different way, but it's still a plan to kill Carol  
13 Kennedy.

14           THE COURT: What's the hookup? What's the  
15 connection between obtaining an employee identification  
16 number and possible acquisition of carbon monoxide?  
17 Remind me from the evidence, if you can or if you would,  
18 if one of the research items was killing somebody via  
19 carbon monoxide or is there a connection, in other words,  
20 what was researched vis-a-vis carbon monoxide gas to the  
21 actual possible acquisition of carbon monoxide?

22           MR. BUTNER: That's my recollection, Judge. I  
23 can't point to something specifically other than the area  
24 where it says, how to kill somebody and make it look like  
25 an accident, that's really the connection with the carbon



1 monoxide.

2 THE COURT: Is there reference within any --  
3 my question to be a little bit more precise is, was there  
4 a connection between what was researched and following up  
5 on that general search to carbon monoxide?

6 MR. BUTNER: I believe so. I think it was a  
7 connection where you can kill somebody and make it look  
8 like an accident if you get them in a confined space, of  
9 course, typically something, you know, that causes their  
10 automobile to directly pump carbon monoxide into the  
11 passenger compartment of the vehicle with insufficient  
12 ventilation to allow for fresh air. Usually, of course,  
13 that's done in a garage or something like that, but I  
14 think that area of inquiry about how to make it look like  
15 an accident, that encompasses a number of different  
16 methods that that can be accomplished.

17 THE COURT: All right. Go ahead. Any other  
18 items that you want to summary that you want to make?

19 MR. BUTNER: I don't think so, Judge. I think  
20 that we've clearly put the position before the Court on  
21 the remainder of the items.

22 MR. SEARS: If I could be heard briefly?

23 THE COURT: Mr. Sears, on which issue?

24 MR. SEARS: Still on Number 3. Our  
25 recollection of the evidence was that the search was

1 actually how to kill somebody and make it look like it's  
2 suicide in this case and I think that's an even clearer  
3 case of the golf between this online research, which the  
4 Court will also remember was very brief, the times spent  
5 in these cites were a matter of seconds and no hard copies  
6 or downloaded copies of this information have been  
7 produced, that I'm aware of in the evidence in this case,  
8 other than searches -- forensic searches by the State's  
9 computer people pulling up fragments of web pages that had  
10 been looked at by Mr. DeMocker.

11           And so to extrapolate from that that Mr.  
12 DeMocker was carefully planning an undetectable murder of  
13 Carol Kennedy from that evidence is a stretch, when  
14 weighed against the obvious prejudice of the Defendant of  
15 just the names of some of these searches and the  
16 requirement that the Defendant to defend his character  
17 against this sort of attack in this case.

18           It would be a different thing if the searches  
19 were relevant to the way in which Miss Kennedy was killed.  
20 This is like saying if Mr. DeMocker spent too much time  
21 watching true crime shows on television or reading pulp  
22 fiction novels about these things, then clearly he's  
23 thinking about killing somebody, and that the only person  
24 that he could be thinking about is Carol Kennedy.

25           And the State then has to drag in this

1 financial pressure boiling point theory that they've  
2 advanced through Mr. Echols and Mr. Casalena in this case  
3 to get you there and in a vacuum this evidence is 404(B)  
4 and creates a terrible prejudicial affect for  
5 Mr. DeMocker.

6 All I can say, Your Honor, on Matters 4 and 5,  
7 without revisiting every bit of that, is simply to say  
8 that in his divorce Mr. DeMocker was not making false  
9 statements or misleading statements about the Book of  
10 Business, just to the contrary. He took an open position.  
11 It was seriously debated in plain view of everyone and it  
12 was Mr. Casalena that developed this theory that there was  
13 of Book of Business and had a particular value and that  
14 was communicated back to Mr. DeMocker and he on the advise  
15 of his lawyer rejected that idea and to somehow  
16 characterize that has false and misleading is utterly at  
17 odds with what the evidence was here and what the reality  
18 was in the divorce case.

19 And by the same token suggesting that he was  
20 then hiding something seems to be a complete  
21 mischaracterization. He could not have been more  
22 transparent, more open about what he was doing on this  
23 point if he had tried. He turned over all of the  
24 information. They had everything they needed to know and  
25 if you remember there was an e-mail that we've seen now

1 after the fact that, of course, wasn't disclosed during  
2 the divorce where Mr. Casalena downplayed to his client,  
3 Carol Kennedy, the likelihood of success on this, coupled  
4 with a request for more money to come up.

5 And try and do it, and a conscious decision  
6 was made by Miss Kennedy with her attorney to abandon this  
7 claim at trial, not just for purposes of settlement, but  
8 to abandon at trial and to say that it appears again in  
9 the divorce decree gives it credence that there was a Book  
10 of Business is not consistent with Anna Young's testimony  
11 in this case that it was there just to preclude some late  
12 argument that it had been over look or omitted.

13 If you went back extracted from the divorce  
14 settlement the relevant values of all of the assets,  
15 there's no 600,000 or \$800,000 discrepancy between the  
16 value of what Mr. DeMocker was awarded and the value of  
17 what Miss Kennedy was awarded by way of their settlement,.

18 Had there been I don't think that Mr. Fruge  
19 and/or Carol Kennedy would have signed off on a settlement  
20 that was so one-side, and I think quite tellingly, you  
21 never hear again, ever, a word about the Book of Business  
22 from Miss Kennedy.

23 She's complaining about other loose ends up to  
24 the very last minute about things that she wants to hang  
25 on to and those things but there's no suggestion that the

1 Book of Business was an issue in her mind. There is no  
2 motion for relief filed by her or by anybody else or  
3 Mr. Fruge. There's no communications that show up on her  
4 computer from Mr. Fruge saying, you know, we got  
5 hoodwinked about this Book of Business by Mr. DeMocker.

6 It was just a position taken in the divorce  
7 case that was thoroughly argued and considered by both  
8 sides and resolved, and it can't be any simpler than that.

9 And then to allow the State to continue this  
10 unsupported, unwarranted attack on Mr. DeMocker for, you  
11 know committing perjury, which is the most -- I think is  
12 the most extreme position they took to these allegations  
13 that he's committing fraud, that he's misleading the  
14 Court, and that he's hiding something, is utterly  
15 inappropriate under 404(B) and needs to be blocked right  
16 now. So we would ask you to remember all of those things  
17 in making a ruling on that. Thank you. I am done.

18 THE COURT: Generally under Rule 404(A), as  
19 you know, evidence of a person's character or trait of  
20 character is not admissible for purposes of proving action  
21 and conformity. 404(B) provides that except as provided  
22 in 404(C), which doesn't apply in this particular case,  
23 evidence of other crimes or wrongs or acts is not  
24 admissible to prove character of a person in order to show  
25 action and conformity therewith.

1           It may, however, be admissible for other  
2 purposes, such as, proof of motive, opportunities, and  
3 preparation, plan, knowledge, identity or absence of  
4 mistake or absence, that is not an exhaustive list of all  
5 the purposes for which such evidence may be admitted.

6           And I readily acknowledge that the act itself  
7 has to be proven by clear and convincing evidence for it  
8 to be admissible, and then also there's a general  
9 relevancy determination is this evidence itself relevant  
10 and does it have reason being excluded for purposes of  
11 prejudice confusion or waste of time.

12           So that is the analysis and I do have  
13 testimony to rely on. I think that I need some review  
14 personally of some the computer evidence to be absolutely  
15 certain of my ruling in connection with that, but here's  
16 my general ruling and observation.

17           Premeditation is a portion of what the State  
18 must prove in connection with the computer searches that  
19 bear on the topic of killing and, I guess, I do have a  
20 comment about whether this implicates some kind of demand  
21 or potential demand by the jurors for Mr. DeMocker to  
22 testify or an undue pressure on him to testify.

23           I think there is plenty of evidence in the  
24 record without Mr. DeMocker testifying that would allow  
25 this defense to make an argument that this is something

1 that is researched for a book based on the files in which  
2 the witnesses for the State would have to admit that  
3 existed on the computer.

4 So I guess I disagree with the perception that  
5 this would be some kind of undue pressure on the Defendant  
6 to have to rebut but I don't disagree with the observation  
7 about one of the retrieved items under a general search,  
8 was even the smallest things can attack, and that that had  
9 reference to a joke cite or that sort of thing.

10 So in terms of bringing that information  
11 before a jury I don't find that the fifth amendment of  
12 rights would be unnecessarily implicated. It's  
13 acknowledged by I suspect by both sides that whoever  
14 killed Carol Kennedy may have premeditated it to some  
15 degree at least at the time of executing the blows and  
16 observation about -- at least my recollection of the  
17 facts, I find that the fact of the research existed and  
18 existed on Mr. DeMocker's own computer and that there is  
19 sufficient evidence with regard to identity of who is  
20 doing the search.

21 I think the real argument becomes more for  
22 what was being searched for and for what purpose and was  
23 it to write a book and that sort of thing. The fact is  
24 that the research took place and I find by clear and  
25 convincing evidence that that research took place and that

1 Mr. DeMocker did it based on the evidence before me. I  
2 think that more to the point -- and I do find that it fits  
3 within the type of information for which it's admissible  
4 under 404(B) for purposes of knowledge, motive, plan. And  
5 the question I think comes down to relevancy and to the  
6 degree of probative value being out weighed by the danger  
7 of unfair prejudice, confusion, or misleading of the jury.

8 I think, therefore, based on my recollection  
9 of the evidence that the evidence with regard to how to  
10 kill and make it look like a suicide is admissible.

11 With regard to the specific research and the  
12 evaluation or obtaining of employee identification number  
13 as it relates to carbon monoxide when that's not connected  
14 to the manner of killing in this case and it's not in my  
15 recollection connected otherwise to the search, I think it  
16 would put it outside the bounds of the evaluation of the  
17 probative value versus prejudice resulting, and it carries  
18 the additionally implication of an attack on the honest or  
19 truthfulness of the Defendant in a fashion where it hasn't  
20 been raised as a defense or an element of character.

21 So at least in the case in chief I think that  
22 the obtaining of an employee -- employer identification  
23 number or application for receipt of carbon monoxide  
24 canisters and the research connected to carbon monoxide  
25 with regard to that, I find at this time that for the



1 State's case in chief that evidence should be excluded by  
2 the danger of unfair prejudice compared to the probative  
3 value of that.

4 I think that the other evidence of research  
5 is admissible and relevant and is free of the danger of  
6 the exclusion of unfairly prejudicial evidence as is  
7 discussed in Rule 403. I find that that issue does not  
8 present itself. There's not a danger of unfair prejudice  
9 as compared to the probative value. So that's Number 3.

10 I may want to revisit that after I examine  
11 the transcript and my notes with regard to what was  
12 testified to about the computer search. That would be my  
13 ruling at this time.

14 With regard to the Book of Business and that  
15 information which is in Number 4 and Number 5 according to  
16 what the parties have asserted that's talking about the  
17 fact of filing of financial documents. It is a fact.  
18 It's a judicial noticeable fact because I've looked at the  
19 domestic relations file. In looking at the domestic  
20 relations file the characterization of those as false and  
21 misleading is not something that I believe can be made.  
22 I've already made findings of that in connection with my  
23 findings on the Chronis hearing.

24 The statements in that sense are not hidden  
25 from the parties or hidden in real terms from the Court.

1 These are items that were disclosed. They were  
2 negotiated, negotiated, in a fairly heated fashion or and  
3 substantial fashion.

4 I find that there was a negotiated settlement  
5 that addressed the issues of the Book of Business and  
6 awarded those to the Defendant to the extent that the  
7 retiring agents' agreement was involved. I note that it  
8 was never signed or at least I haven't been presented with  
9 a copy if it was and so I don't think that the evidence  
10 concerning false and misleading statements is admissible.  
11 I'm going to disallow that.

12 I find clear and convincing evidence of the  
13 financial report that Mr. DeMocker made and that  
14 Mrs. DeMocker -- Miss Kennedy made in their presentations  
15 to the divorce court, so clearly those occurred. And I've  
16 -- again, they may pertain to a pecuniary motive and to  
17 that extent fit within the exception for the item itself  
18 to be admitted and I find that they're free of 403  
19 prejudice and not probative to that point and relevant  
20 Mr. Casalena and Mr. Echols notwithstanding and their  
21 testimony notwithstanding.

22 So to the extent that this evidence is  
23 characterized as false and misleading I reject that to the  
24 extent that it's admissible to give a financial picture, I  
25 accept that and would allow the offering of the exhibit.

1 Exhibits that are related to the financial  
2 condition of the parties in May -- in March or July  
3 essentially of 2008 but not with regard to the  
4 characterization that these are what was filed by the  
5 Defendant are false and misleading.

6 Does that make sense?

7 MR. SEARS: Yes, Your Honor.

8 MR. BUTNER: Yes, Your Honor.

9 THE COURT: Number 6.

10 MR. SEARS: Before we jump to Number 6, is it  
11 also your order the State may not assert that these  
12 documents or any other document constitutes evidence that  
13 Mr. DeMocker was hiding this asset, this asset, being the  
14 Book of Business?

15 THE COURT: Mr. Butner, do you want to be  
16 heard with regard to what arguments can be made on that?

17 MR. BUTNER: I think that I've made them,  
18 Judge.

19 THE COURT: I would restrict the State's  
20 ability to make an argument that he's hiding assets when,  
21 in fact, that's a negotiated item, since I've been told by  
22 the State that the only reference in that category of  
23 information had to do with the Book of Business, and I  
24 find that that was not hidden from Miss Kennedy or her  
25 counsel and was a subject of negotiated settlement, in

1 fact, between Mr. DeMocker his attorney Miss Kennedy and  
2 her attorney.

3 MR. SEARS: Thank you.

4 THE COURT: The evidence under the category  
5 Number 6 I think that I've -- I think I've addressed and  
6 confirmed with both counsel what that particular evidence  
7 involved.

8 I will find there to be clear and convincing  
9 evidence that Mr. DeMocker ordered books, that the books,  
10 in fact, were delivered to his office, that these books  
11 pertained to hiding identity or going on the lamb, so to  
12 speak. I found -- had evidence earlier presented of his  
13 obtaining of a passport, had evidence of his having a  
14 motorcycle that was equipped with camping gear and food  
15 and a GPS map of the Republic of Mexico, and recalled  
16 there to be -- I recall it in a context of an entry in the  
17 diary of his daughter and to the extent that that evidence  
18 is -- maybe obtained through laying foundation of it being  
19 her writing and conclusions it could come in in that  
20 fashion. So I do have evidence of those things occurring  
21 and I also have evidence that Mr. DeMocker was still at  
22 his desk and working and found still in the area.

23 The Court finds clear and convincing evidence  
24 that establishes that those acts occurred. I think that  
25 those acts do go to a permitted purpose under 404(B) in

1 terms of knowledge and motivation and consciousness of  
2 guilt. It's an argument that could be made. There are  
3 obviously counter arguments can be made to the evidence  
4 that is presented.

5 I think with the proper instruction the jury  
6 is the one fact finder that makes that determination. So  
7 long goes as the evidence is found to be clear and  
8 convincing, fits within one of the exceptions, which I  
9 find both of those prongs that it's relevant and not  
10 unfairly prejudicial compared to the probative value.

11 So I think that type of evidence does fit  
12 within, and that specific evidence, does fit within those  
13 requirements under 404(B) so I would allow Number 6 as  
14 well. I think that covers the other acts that you asked  
15 me to address at this time.

16 MR. SEARS: I believe that's correct, Your  
17 Honor.

18 THE COURT: Mr. Butner.

19 MR. BUTNER: I believe so too, Judge.

20 THE COURT: We had left Number 9 of the  
21 pending motions and do we have some other motions that are  
22 still pending that you think we need to address before  
23 taking up the photographs?

24 MR. SEARS: I think we have still been  
25 discussing our motion for adoption of jury questionnaire

1 and jury selection plan, that if you think you would  
2 benefit from more discussion of that we're more than  
3 happen to do so, but as we said earlier this week, for any  
4 number of reasons, not the least of which is trying to  
5 plan space availability and such things, we would  
6 encourage the Court to move quickly on the decision making  
7 on this. I think we've gone through and flyspecked the  
8 questionnaire.

9 THE COURT: I think I'm going to hold on that  
10 for the time being and go through that this weekend and  
11 give you what I think is -- give you a draft of where I  
12 think I am on the particular language of the questions and  
13 take that up when I see you next week.

14 MR. SEARS: That would be a good thing. And  
15 part of our motion, of course, is our, you know, we call  
16 it for lack of a better word, the protocol but the jury  
17 selection plan with dates and phases and a particular kind  
18 of Voir Dire is very important for us going forward to be  
19 ready to do that.

20 THE COURT: I'm not sure I can give you the  
21 14th of April to be specific as to that issue given my  
22 other trial calendar. I may give you the 13th of April or  
23 some other time.

24 MR. SEARS: We just arbitrarily selected all  
25 of those dates and particularly with respect to the dates

1 for the Court to resolve some issues and for the defense  
2 and the prosecution to meet on these things we are  
3 flexible.

4           The reason that we picked those dates is we  
5 thought that it fit within the 30 daytime period between  
6 the beginning of the questionnaire process and the first  
7 day of trial.

8           THE COURT: Right. So in general terms I'm  
9 okay with the time frame that's laid out and I'm okay with  
10 doing a jury questionnaire. I have some qualms about the  
11 length of it simply because I wonder about the  
12 concentration of jurors or jury panel members and focusing  
13 on something like this but, nonetheless, I think that it's  
14 even important to learn about those things, and the  
15 primary issues that I had had to do with cost and  
16 logistics and somewhat on my availability for the week of,  
17 I guess, it's April 12th through 16th -- 12 through 16th  
18 because of the problem calender that I have.

19           So I'll let me go over that over the weekend  
20 and have a draft of where I would come down on those  
21 questions, where there is some dispute between parties,  
22 and recognizing the State's overall objection, and when we  
23 met next week or sometime prior to next week I may be able  
24 to e-mail you a copy of where I think I am on the  
25 questionnaire.

1 MR. SEARS: If I could move to the motion to  
2 compel that we filed that the State still has time to  
3 respond to.

4 MR. BUTNER: Let's not move to that,  
5 Mr. Sears. Can't we see if we can work that out?

6 MR. SEARS: That's what I was about to say.

7 MR. BUTNER: Okay. I thought you were going  
8 to going to start arguing it.

9 MR. SEARS: No.

10 MR. BUTNER: Which we haven't had opportunity  
11 to respond.

12 MR. SEARS: I think that we're in reasonable  
13 conversation with the State on this and we've gotten  
14 already some of the requested material directly from the  
15 Sorenson Lab and to the extent that it is not resolved or  
16 on track to be resolved it might be something that we  
17 could take up after the State responds perhaps even next  
18 Friday when we're back here. I think that's a fair time  
19 table in this case.

20 THE COURT: Okay.

21 MR. BUTNER: And speaking of next Friday,  
22 Judge, I have been subpoenaed to testify in a hearing next  
23 Friday at 9 o'clock Friday morning over -- I think its  
24 over in the Verde. So in terms of me being here next  
25 Friday, that's certainly a problem at least as far as the



1 morning goes.

2 THE COURT: I think my Friday has something in  
3 the afternoon, though, so which is why I put you in the  
4 morning.

5 MR. BUTNER: Mr. Fields is going to be  
6 handling the morning discussion. I think the Court knew  
7 that.

8 THE COURT: I think I knew that.

9 MR. BUTNER: I sure hope I'll be available in  
10 the afternoon.

11 THE COURT: I have a hearing at 2 o'clock on a  
12 shooting case that I have that is coming up for trial the  
13 4th of February. So 2 o'clock on the 22nd I have  
14 something else going. To the extent that we need to get  
15 ahold of you and maybe even if you appear telephonically,  
16 let's see if we can nail down the issue of the jury  
17 questionnaire. So at least for that purpose may be we can  
18 set something at 1:30 before I start the other matter.

19 MR. SEARS: Are we changing the 9 o'clock  
20 start on the hearing now?

21 THE COURT: No. Mr. Fields is covering that  
22 apparently and so the 9 o'clock is still the start and  
23 hoping that we will be done in the morning with that but I  
24 guess we'll see.

25 MR. SEARS: Okay. There's one other matter,

1 Your Honor, which I think we may get an answer from the  
2 State regarding before the court has to step in but we  
3 have made a request of the State to forward letters to  
4 Ruth Kennedy and John Kennedy, the victim's brother, and  
5 that's based on some disclosure we received which was a  
6 transcript of a telephone call between Detective McDormett  
7 and the Kennedys about whether they would or wouldn't  
8 consent to a defense interview in this case.

9 THE COURT: Hold that thought for just a  
10 second.

11 MR. SEARS: I'm sorry.

12 THE COURT: Go ahead. Excuse me.

13 MR. SEARS: This is my understanding.

14 Ms. Chapman has been speaking with Mr. Butner about this  
15 but our understanding remains that they have declined to  
16 be interviewed by the defense but there is still the  
17 confusing question of whether they would agree to be  
18 disposed and I think that Mr. Butner needs to speak with  
19 them and think he intends to do that and we need to know  
20 at some point pretty soon here whether Mr. Butner will  
21 simply send our letters out to them.

22 So we would ask that by -- certainly by next  
23 Friday that we have a more complete understanding from the  
24 State of what the victim's position is. I guess, maybe to  
25 put this in a less -- Ms. Chapman tells me that I'm

1 garbling.

2 MS. CHAPMAN: Your Honor, what we primarily --

3 THE COURT: Go ahead. Ms. Chapman.

4 MS. CHAPMAN: Thank you. What we primarily  
5 need to hear from the State is whether or not they intend  
6 to and when they, in fact, do send the letters that we  
7 have prepared to John and Ruth Kennedy. That's the first  
8 step. Are they going to send these letters? Have they  
9 sent the letters?

10 We provided them to Mr. Butner on Tuesday and  
11 I understand he hasn't made a decision about whether he  
12 will send them so when that decision is made we'll need to  
13 take it up with the Court. Hopefully it will be made by  
14 next Friday and we can address it at that time if we need  
15 to.

16 THE COURT: Mr. Butner, appears to be ready to  
17 tell us that.

18 MR. BUTNER: Well, actually I'm not ready,  
19 Judge, I was trying to find the Victim Rights Statute and  
20 look at it and see, that is the issue. I have through the  
21 victim's service representative contacted the Kennedys  
22 recently and asked if they would submit to a defense  
23 interview. Their response was no.

24 I haven't spoken to them recently directly  
25 about that issue. I had previously spoken with them about

1 that issue, you know, months ago and they didn't want to  
2 do a defense interview then when I personally spoke with  
3 them but I'll -- as I told Ms. Chapman, you know, I  
4 haven't had a chance to talk to them directly again, and I  
5 will do that. I wanted to make sure then from a legal  
6 point of view whether there was any problem with me  
7 forwarding on these letters.

8 I haven't looked at the letters. They're in  
9 -- I think they are in sealed envelopes. I'm not sure. I  
10 didn't even check to see if the envelopes were sealed. I  
11 assumed they were, and so I just want to make sure that I  
12 was not somehow violating the Victim's Right Statute by  
13 passing on these sealed letters.

14 And then the other thing that had come up was  
15 this interview by Detective McDormett of Ruth Kennedy.  
16 Ms. Chapman was kind enough to give me a copy of the  
17 transcript to the extent that one could be prepared of  
18 that interview because a lot of the responses to the  
19 questions from Detective McDormett were apparently  
20 inaudible, but in any event, that was simply suppose to be  
21 a relatively simple conversation about whether Ruth  
22 Kennedy would submit to a deposition.

23 And the reason being for a deposition her  
24 advanced age and there was concern as to whether she would  
25 be available at the time of trial and she indicated that

1 she would submit to a deposition and I think that's still  
2 probably her position, although, I haven't reconfirmed  
3 that recently either.

4 MS. CHAPMAN: And just to be clear, Your  
5 Honor, we have not asked for a deposition and we're not  
6 asking -- I'm not asking Mr. Butner to go back to Ruth  
7 Kennedy and John Kennedy and ask about an interview.  
8 We're asking that these letters be passed directly to  
9 them.

10 I think the statute constitutes that that's  
11 appropriate to go through Mr. Butner's office and that's  
12 how we initiated the communication given your ruling on  
13 the Victim Rights Acts Motion that we had submitted  
14 earlier.

15 And I -- there is specific reasons for doing  
16 that and that's why we provided that interview of what you  
17 could hear of it to Mr. Butner. I don't think we need to  
18 get into all of that if the letters are going to be passed  
19 on. So I suggest that we defer that conversation until we  
20 know from Mr. Butner whether he intends to do that.

21 THE COURT: All right. Then -- so you're  
22 going to have a conversation or communication with the  
23 Kennedys to find out if they are willing to receive that,  
24 first of all, and to do your own research on what you need  
25 to do with the letters --

1 MR. BUTNER: Exactly.

2 THE COURT: -- in the event that they do want  
3 to receive it or don't want to receive it?

4 MR. BUTNER: Exactly, Judge.

5 THE COURT: All right. Can you get an answer  
6 back to the defense with regard to those two items then  
7 sometime within the next week before we meet next week?

8 MR. BUTNER: Yes. I think that the deadline  
9 on Friday is entirely reasonable. I hope I'll have an  
10 answer sooner than that but I've been kind of stretched  
11 thin lately, you know.

12 THE COURT: No doubt. I know this isn't your  
13 only case although --

14 MR. BUTNER: It seems like it though.

15 THE COURT: -- sometimes it seems like it, and  
16 maybe it should be. Now, I'll even say that much. If I  
17 can do anything to assist you in that I would but I don't  
18 think that my opinion on it would have any meaning for  
19 your boss.

20 MR. BUTNER: No comment.

21 THE COURT: Yeah. So are we only dealing then  
22 -- the only matter we have left this morning is the  
23 photographs?

24 MR. SEARS: I believe that's correct, Your  
25 Honor.

1 MR. BUTNER: I think so, Judge.

2 THE COURT: Perhaps because of what we said  
3 earlier in the week -- the courtroom is free of media  
4 personnel -- so I think that we can discuss this in the  
5 courtroom without -- no need -- I suppose we may want to  
6 reconfigure the setup of the courtroom if somebody comes  
7 in. No need to do what was suggested by somebody at one  
8 point to lockup the courtroom. I think that we can go  
9 ahead with it and as things currently stand, if somebody  
10 chooses to join us where you think that there is an issue  
11 for us of dealing with that then I'll take a recess.

12 MR. SEARS: Thank you, your Honor.

13 THE COURT: Do you want to take a recess now  
14 or do you want to preempt the possibility of somebody  
15 walking in on this and reconfigure and turn the table so  
16 that so when you are looking at something somebody from  
17 the back won't be looking over your shoulders?

18 MR. SEARS: Could we take a brief recess?

19 THE COURT: You want to reconfigure the  
20 courtroom?

21 MR. SEARS: I'll help you do that too. I'll  
22 be right back.

23 MR. BUTNER: That's a good idea.

24 THE COURT: Let's do that.

25 (Whereupon, a break was taken.)

1 THE COURT: Let's go back on the record. We  
2 have about 50 minutes or so to go through a lot of  
3 photographs and I'll reposition myself so that I can look  
4 at what you need me to look at.

5 We're dealing -- and Mr. DeMocker is still  
6 present, of course. Mr. Butner, for the State, and  
7 Miss Chapman, Mr. Sears for the defense.

8 We're dealing with the motion in limine  
9 concerning certain photographs. The motion filed December  
10 22nd. State's response of January 4th. Defense reply  
11 January 8th. Everyone asked me to take a look at the  
12 photographs. Some I obviously have seen as part of  
13 Dr. Keen's testimony and other witnesses' testimony but I  
14 think that what counsel are proposing is that these not be  
15 admitted separately for purposes of today's hearing and  
16 marked with a court identification number.

17 Rather, I think what counsel wants me to do  
18 was take a look at those that are being proposed as a  
19 group from which the evidence items to be used at trial  
20 would be taken, not all of them -- of the photographs that  
21 I'm being shown would, in fact, be used, as I understand  
22 is the State's position, but some within the group will be  
23 used.

24 And I think that I was told at one point there  
25 was something on the order of a thousand photographs and,



1 clearly, Mr. Butner doesn't intend to use a thousand  
2 photographs based on what he said earlier.

3 So if we can refer to the photos by the  
4 designations that you all have given which is -- or as the  
5 sheriff's office has given which is calling a disk by a  
6 particular letter and then the J Peg Number that goes  
7 along with that, I think we can make a decent record about  
8 what I'm looking at or allowing or disallowing.

9 Right.

10 MR. BUTNER: Thank you. Judge, I think that's  
11 entirely accurately as I understand the process too.

12 THE COURT: Well, with no objections I'm going  
13 to take my robe off, so I can move around.

14 MR. BUTNER: Do you have no objection to that,  
15 Mr. Sears?

16 MR. SEARS: None that I want to make at this  
17 time.

18 THE COURT: Good. You're proposal is simply  
19 to go through this, Mr. Butner?

20 MR. BUTNER: Correct, Judge. Actually,  
21 probably the best would be not to start with this bunch  
22 here unless there's no objection to crime scene  
23 photographs, per se, as being gruesome.

24 MS. CHAPMAN: I think there are some crime  
25 scene photographs --

1 THE COURT REPORTER: Your Honor, can we pause  
2 because I'm going to try and move closer.

3 THE COURT: Okay.

4 MR. BUTNER: Speaking -- I guess I could use  
5 this. One of these. Just pull one out and use it.  
6 Speaking for the record now we're on --

7 MS. CHAPMAN: Just one second, I think.

8 MR. SEARS: Judge, under the circumstances I  
9 think that we would be willing to waive Mr. DeMocker's  
10 presence so he could be taken back if that's acceptable  
11 with the Court.

12 THE COURT: That's acceptable to me. I  
13 respect that.

14 Let me say, Mr. DeMocker, you obviously have a  
15 right to be present at all of the proceedings in your  
16 case. You're willing to waive your presence for purposes  
17 of our going through the photographs?

18 THE DEFENDANT: Yes, I am.

19 THE COURT: I'll accept the waiver, find that  
20 it is made knowingly, intelligently, and voluntarily.  
21 I'll excuse Mr. DeMocker.

22 THE DETENTION OFFICE: Is that for the  
23 remainder of the morning?

24 THE COURT: It's the remainder of the day.  
25 The next hearing that he's present at is, I believe,

1 Friday at 9.

2 (The Defendant exited the courtroom.)

3 MR. SEARS: Thank you, Your Honor.

4 MS. CHAPMAN: Okay. So we're on --

5 MR. BUTNER: K.

6 MS. CHAPMAN: -- disk --

7 MR. BUTNER: This is Disk L and then there's  
8 only one photo on this first page that we're talking  
9 about. I don't know that we need -- what I would suggest  
10 is that your just flip through these and then say which  
11 ones you have a problem with.

12 Does that make sense?

13 MS. CHAPMAN: It's only the ones that you have  
14 tagged?

15 MR. BUTNER: No -- well, yeah. The tags are  
16 on all of the crime scene photos that have a picture of  
17 the body. That's what I attempted to do, was to sort them  
18 out that way so that --

19 MR. SEARS: To understand, Judge, we had asked  
20 the State to bring photos of the crime scene that depicted  
21 the victim's body of the autopsy -- of the post-autopsy  
22 session with the golf club where they brought the body out  
23 and then the skull reconstruction by Dr. Fulginiti.

24 And so I think that what I'm seeing is it  
25 looks like you brought all of the crime scene photos and

1 then went back and used yellow post-its to mark the ones  
2 that have the body in it?

3 MR. BUTNER: That's exactly, right.

4 MR. SEARS: Let me ask this, if we have no  
5 objection, this is going to go -- the ones would go into  
6 the pool of potential photos. We're not agreeing today  
7 that we would waive any foundational or other objections  
8 that we have to them, just -- we're just here talking  
9 about the gruesome prejudicial affect.

10 MR. BUTNER: Exactly.

11 MR. SEARS: Okay. Got you.

12 MR. BUTNER: No waiver as to foundation or  
13 accumulative or anything like that.

14 MS. CHAPMAN: So we'll just take this and  
15 review it?

16 MR. BUTNER: Right.

17 MS. CHAPMAN: Yeah?

18 MR. BUTNER: Yeah. That's fine.

19 MR. SEARS: Maybe that's the simplest way to  
20 do it.

21 MS. CHAPMAN: It would be quicker.

22 MR. BUTNER: Here's the method to my madness.  
23 You see little tabs on the top and little tabs on the  
24 bottom, and then these tabs on the side. I tried to tab  
25 the individual photographs from the top and bottom and

1 then where I just looked at it and it was all four, I just  
2 put one on the side.

3 MS. CHAPMAN: Okay.

4 MR. BUTNER: Okay?

5 MR. SEARS: Okay. Got you.

6 MS. CHAPMAN: So we're also not going to make  
7 any objections as to the cumulativeness of it because  
8 right now -- we'll be doing that at another time.

9 MR. BUTNER: Right. I'm sure you would.

10 (Mr. Sears and Ms. Chapman confer.)

11 THE COURT REPORTER: Your Honor, do you want  
12 me to report this?

13 THE COURT: Yes.

14 THE COURT REPORTER: Mr. Sears -- I can't hear  
15 Mr. Sears.

16 THE COURT: So if you make a statement,  
17 Mr. Sears, will you keep your voice up?

18 MR. SEARS: I'm sorry. That was intended to  
19 be a remark between the two of us.

20 THE COURT: Or those that you want to be on  
21 the record, keep your voice up.

22 MR. SEARS: I'm sorry.

23 (Mr. Sears and Ms. Chapman confer.)

24 THE COURT: Do you care if they make a mark on  
25 your tab?

1 MR. BUTNER: No. Yeah, if you want to, you  
2 can put a little mark on the yellow tab. If there's, you  
3 know, if you think that you need to object to that  
4 particular photo, I don't have any problem with that.

5 MS. CHAPMAN: Okay. Thank you.

6 MR. BUTNER: Sure.

7 MS. CHAPMAN: So looking at Disk F3 of three  
8 Photograph Numbered 4747 and then proceeding onto 4750,  
9 4749, 4748, and 4751. These are all photographs that we  
10 would object to as being gruesome.

11 I'm not sure, Joe, when we were speaking about  
12 this, you said that you might not be interested this  
13 these. I don't know if we need to continue. These are  
14 photographs after the body has been moved.

15 MR. BUTNER: Go ahead and just state those  
16 things for the record, if you would, and I think that I  
17 can respond for the record too.

18 MS. CHAPMAN: I think she's got it on the  
19 record. So you can respond.

20 MR. BUTNER: Yeah, I know, but we have to  
21 write them down.

22 MS. CHAPMAN: So you want me to repeat what I  
23 just said?

24 MR. BUTNER: Would you, please. Don't say it  
25 so fast.

1 MS. CHAPMAN: Sure. F3 of 3 is the disk and  
2 the Imagine Numbers 4747, 4750, 4749, 4748, and 4751,  
3 4754.

4 Even these?

5 MR. SEARS: Yeah.

6 MS. CHAPMAN: 4752, 4753, 4755, 4758, 4757,  
7 4756. M.AM(MR. SEARS: Uh-huh.

8

9 MS. CHAPMAN: Let's start with that as a bunch  
10 and it's a grouping of the victim's body in a body bag.

11 MR. BUTNER: Is this where it begins?

12 MS. CHAPMAN: I believe it begins here  
13 (indicating).

14 MR. BUTNER: Okay. And that's --

15 THE COURT: Actually, they've objected to 4747  
16 all the way through 58.

17 MR. BUTNER: Okay. I wouldn't be offering  
18 4747. Now, let me back up on that statement for just a  
19 moment. It appears to me that these particular  
20 photographs, first of all, they depict the victim in the  
21 body bag and so, really, of course, the body has been  
22 moved. And it's not an autopsy photo. I think that the  
23 primary purpose of the photographs at this juncture is  
24 purely identification purposes, and if that's the case,  
25 I'm assuming we're not going to have a problem with

1 identification in this case?

2 MR. SEARS: I don't imagine we would.

3 MR. BUTNER: Okay. So 4747 I don't have a  
4 problem with withdrawing that photo or 4748 or 4749, 4750,  
5 4751. The State won't be offering any of those. 4752,  
6 53, and 55 I do not think are gruesome photographs. It  
7 would be this (indicating) photo, this (indicating) photo,  
8 and this (indicating) photo.

9 THE COURT: Numbers again?

10 MR. BUTNER: I should just say 4752, 4753,  
11 4754 and 4755. 522, and 53, I don't believe are gruesome  
12 photographs. They just depict, basically, the lower  
13 portion of the victim's body. Her left leg -- left leg  
14 view from both sides. And I don't have any objection to  
15 54 and 55 not being offered, so to speak.

16 In regard to 52 and 53 the only reason that I  
17 can conceive of them being offered is that there was some  
18 discussion in Dr. Keen's testimony about this what appears  
19 to be an abrasion on the left side of the leg and I would  
20 think that these might be relevant for that purpose  
21 because there was -- I can't remember exactly what it was  
22 about.

23 THE COURT: My view of 5253 is that they are  
24 not gruesome.

25 MS. CHAPMAN: And 55?



1 MR. BUTNER: I'm not offering.

2 MS. CHAPMAN: Okay.

3 MR. BUTNER: And 54 I'm not offering. Okay.  
4 We went on, didn't we, through 58 as I recall?

5 THE COURT: Yes.

6 MR. BUTNER: I don't think that 58 is  
7 gruesome. I don't think 56 is gruesome and I don't think  
8 that 57 is gruesome either, and so I will just tell you  
9 that I don't think that I'll be offering those but if  
10 those photos were to be offered, it's likely that the  
11 purpose that they would be offered is, again, that mark on  
12 her left leg and, of course, it's not -- I'm not going to  
13 need, you know, five or six or seven photos of have that  
14 but likely it would only require one, maybe two at the  
15 most. So --

16 THE COURT: I don't conclude that those are  
17 particularly gruesome either; 56, 57, 58.

18 MS. CHAPMAN: And is 59 one that you had  
19 marked or do we need to discuss 59?

20 MR. BUTNER: I left it marked because it's a  
21 crime scene photograph and I'm not exactly sure what the  
22 heck even that stuff is right there (indicating) at this  
23 point.

24 MR. SEARS: Those appear to be items that were  
25 on the floor near the body. You can see the body bag in

1 the top of the picture. I think that's just what's left  
2 there after the body is moved.

3 MR. BUTNER: I think you're right but I don't  
4 know that and so, you know, I'm just sort of leaving that  
5 alone, so to speak. It certainly isn't a gruesome  
6 photograph at least from my point.

7 MR. SEARS: My thinking on all of the  
8 photographs that depict part of the body bag was that the  
9 concept of a person being taken away in a bag and is --  
10 has some inherent gruesome aspect to it. Doesn't add  
11 anything to the case and I think that Mr. Butner is right,  
12 there are objections we would make on other grounds, other  
13 than gruesomeness later, but that's what I was thinking  
14 when we discussed all of these pictures. They were all of  
15 the pictures that showed the body bag.

16 THE COURT: So noted.

17 MS. CHAPMAN: I believe that we have now  
18 completed a review of this binder and can move to the  
19 other one.

20 MR. BUTNER: I'll have you know I'm taking  
21 very good care of this.

22 MS. CHAPMAN: Indeed. So this is Disk C.

23 THE COURT: If you get a few coherent pages at  
24 a time and want to go through them in that fashion that  
25 would be great.

1 MS. CHAPMAN: Okay.

2 (Mr. Sears and Ms. Chapman confer.)

3 MR. SEARS: Your Honor, I think we would  
4 object. This is -- see if we can identify this first  
5 page. This is Disk --

6 MS. CHAPMAN: -- C 2978, 2979, 2980, and 2981.  
7 Let's take those four. I think we would object to those  
8 four photographs as gruesome. Also noting that the  
9 measurement used there had is an Odontology ruler and not  
10 one properly used for skull measurements.

11 MR. BUTNER: Okay. I believe that as nearly  
12 always I can tell that these are all -- first of all, of  
13 course, there's photo of the victim but, secondly, they  
14 are four separate photos of four separate wounds to the  
15 victim's skull and the measuring device is there to  
16 demonstrate, of course, some degree of accuracy the size  
17 of the wound, and to that extent, I think, that each of  
18 these are relevant and they are not so gruesome as to be  
19 in some fashion prejudicial and they have significant  
20 probative value because this is a scientific examination  
21 by the ME of these injuries to the victim's head.

22 MS. CHAPMAN: Well, it certainly appears that  
23 2980 and 2979 are measuring potentially the same wound,  
24 and we're looking at the -- on those two photographs, the  
25 victim's head with her hair pulled back looking down

1 inside what appears to be underneath the skull.

2 And in 1978 we're look at the victim's eye and  
3 abrasion above her eye.

4 I can't tell what 2981 appears to depict.

5 MR. BUTNER: You know, you're right. You  
6 clarified that for me because I was thinking that they  
7 were four separate ones. And 79 and 80 are of the same  
8 wound, I guess, probably --

9 MR. SEARS: Hang on a second.

10 (An unidentified person enters and  
11 exits the courtroom.)

12 MS. CHAPMAN: Okay.

13 MR. BUTNER: Probably one of those would --

14 THE COURT: Off the record.

15 (Whereupon a discussion was held  
16 off the record.)

17 THE COURT: Back on the record.

18 MR. BUTNER: Probably one of those photos  
19 would suffice because we would only need one, of course,  
20 to measure that wound and, I guess, I'm not in a position  
21 to say which one is, you know, less gruesome.

22 THE COURT: As between the two, 79 and 80,  
23 they do appear to cover the same wound. It's difficult  
24 for me to identify as well whether 2981 is the same or  
25 different based on the nature involved in the photograph.

1           They are not unduly gruesome in terms of  
2 identifying the wound but I would not allow multiple  
3 photographs of the same thing to be used in an effort to  
4 minimize the prejudicial nature of it. They are described  
5 accurately by Miss Chapman and what she said on the  
6 record.

7           78 I also would not find unduly gruesome for  
8 purposes of showing the entry that was testified to by  
9 Dr. Keen. So I find it probative. Again, I'm probably  
10 not going to allow multiple photographs of the same wound  
11 for each of these. I don't think that 78 in particular is  
12 particularly inflammatory.

13           I don't think, frankly, either side is  
14 disputing the death or more in particular what caused the  
15 death. However, neither do I think that the case needs to  
16 be tried in a vacuum without the jury being able to  
17 identify and see for themselves what the nature of the  
18 wounds were.

19           MR. SEARS: Your Honor, if I could make one  
20 further objection to 79 as opposed to 80, if one of the  
21 purposes of 80 is to orient the wound to, for example, a  
22 location above the victim's left ear, you can see that ear  
23 in a close-up in 80.

24           . What is disturbing to us is the need to  
25 show the wound but then to show other portions of the

1 victim's body and her face and her facial features that  
2 has inflammatory connotation.

3 If we're looking at looking at the size -- I  
4 mean, we want to know the size and other characteristics  
5 of the wound, a close-up of the wound particularly in 80  
6 that has the ear there so that Dr. Keen could orient that  
7 wound to a location in the skull.

8 So we would object to 79 because it  
9 gratuitously shows the left side of the victim's face and  
10 the back and shoulders.

11 THE COURT: I understand that. I agree with  
12 you on some of your observations about 79 compared to 80.  
13 The other fact of 79 is that the ruler is not as easily  
14 able to be read compared to 80.

15 As I said, I don't find -- I don't find them  
16 to be unduly inflammatory prejudicial or gruesome but as  
17 between the two, if there's a selection, I think that 80  
18 is less objectionable than 79 is, but I don't know what  
19 the need may be. I won't allow both photographs --

20 MR. BUTNER: I understand, Judge.

21 THE COURT: -- unless there's some distinction  
22 that's shown --

23 MR. BUTNER: I'll pick one --

24 THE COURT: -- in the presentation.

25 MR. BUTNER: -- at the time of trial.

1 MR. SEARS: I just think 81 is unclear. I  
2 think you can't tell what it is.

3 MR. BUTNER: 84 is the one that would be used.  
4 I only tabbed that picture above and that's just to show  
5 the injuries on the upper right portion of the victim's  
6 body near the area of the neck and shoulder and shoulder  
7 blade.

8 THE COURT: Objections 84?

9 MR. SEARS: I'm trying to see what this  
10 (indicating) would be. Her right shoulder blade, her  
11 back, that's her neck there (indicating), and her head. I  
12 don't have a gruesomeness objection as to that.

13 THE COURT: Okay. Why don't you go through  
14 and we can resume our way of showing these.

15 MR. SEARS: Is that -- maybe I'm missing --  
16 you would offer all?

17 MR. BUTNER: No.

18 MR. SEARS: Just the tabbed ones?

19 MS. CHAPMAN: C 2985, 2983, and 2982, would  
20 not be offered.

21 MR. BUTNER: Correct.

22 MR. SEARS: These (indicating)? Okay.

23 MS. CHAPMAN: And with respect to this page,  
24 Joe, 2986, 2989, and 2987 would also not be offered?

25 MR. BUTNER: No. 2986 would be offered and

1 2989 would be offered.

2 MS. CHAPMAN: Okay. Thank you.

3 MR. SEARS: Your Honor, I would object to  
4 2986. There is no need to depict anything other than what  
5 we talked about in terms of these markings on her upper  
6 right thigh. It's a matter of privacy and respect for the  
7 victim. If we could -- if you want to offer that item, if  
8 you'd cropped it so as to not show her naked -- trying to  
9 think --

10 THE COURT: Butt.

11 MR. SEARS: -- buttocks area. There you go.  
12 I was trying to think of a better word. That's the actual  
13 word.

14 MR. BUTNER: To clarify that, there's actually  
15 different ways to crop but I'm way looking at that  
16 thinking because of the injury extends up the side of the  
17 thigh and along the side of the buttocks, I could crop it  
18 in a lengthwise fashion, so to speak, to prohibit viewing  
19 of the left cheek, so to speak.

20 MR. SEARS: Okay.

21 MR. BUTNER: But allow viewing of the portion  
22 of the right cheek, so to speak, that demonstrates the  
23 complete injury.

24 MR. SEARS: Doing it the way you're doing it  
25 here (indicating), which is to mask, essentially, the left



1 half of the photograph or as the Judge is doing it, at an  
2 angle maybe that's the easiest way and you can understand  
3 that that's the right leg and not the left leg but to the  
4 extent that they could be cropped in some acceptable  
5 fashion to afford her some privacy, then I don't object on  
6 gruesomeness grounds.

7 THE COURT: On 2986 I don't find it gruesome  
8 but I find that it would be important to be respectful to  
9 the decedent in cropping the photograph.

10 MR. BUTNER: Okay. I think I can do that  
11 without much difficulty and I'll tell you what photograph.  
12 Pretty much like that (indicating).

13 The only thing -- we need that there because  
14 that continues in that area, you know.

15 MS. COWELL: Okay. All right. I can move  
16 that back out.

17 MR. SEARS: On 2989, Your Honor, I can't tell  
18 from this photograph which injury this is and whether it  
19 is -- at which stage in the autopsy it's done. My guess,  
20 is because there is still so much hair shown here that  
21 it's before the scalp is reflected. I can see an ear in  
22 the photograph but I just can't tell from that photograph  
23 if whether it is the same wound that we saw in earlier  
24 photographs above the left ear.

25 MR. BUTNER: You know, I understand that, and

1 I couldn't tell either. In fact, I recall having this  
2 same problem when I was examining Dr. Keen on the witness  
3 stand at the Chronis hearing and I needed him to explain  
4 to me which side we were dealing with. And so, I believe,  
5 that I need some photograph because I believe that it is a  
6 separate injury than the ones we've already been looking  
7 at.

8 THE COURT: Well, I have a question as to  
9 2989. It's difficult for me to make a ruling with regard  
10 to that not knowing the purpose for which it might be  
11 sought. It appears, in general, to be somewhat gruesome  
12 and I may preclude it on that basis unless there is a good  
13 reason to use that.

14 MR. BUTNER: Judge, to clarify what the reason  
15 would be it's to demonstrate -- if you'll recall  
16 Dr. Keen's testimony there were -- he said that she was  
17 beaten basically around her head, so to speak, and on both  
18 sides of her head, and then as I understood it, across the  
19 back -- upper back of her head and then, of course, there  
20 were those facial injuries that are much more easy to see  
21 because there's no hair there. And think this is one of  
22 those separate discreet injuries that occurred in the  
23 beating process and so that's why it would be offered.

24 MR. SEARS: May I just suggest we don't have  
25 foundation for that, at this point, without something more

1 from Dr. Keen, I think we're all guessing that's a  
2 photograph of her.

3 MR. BUTNER: Absolutely.

4 MR. SEARS: If the State can't articulate a  
5 reason and the Court finds it inherently gruesome I would  
6 ask that the Court not permit it. If the State has  
7 additional foundation on that one photo, I don't think  
8 that it would be terribly disruptive of the trial to deal  
9 with that as it comes up if the State and Dr. Keen  
10 conclude that it's essential to tell the story in this  
11 case.

12 THE COURT: I believe that it's prima facie  
13 gruesome. I'll put it that way without -- I don't know  
14 that it's able to be excluded on that basis but -- so I  
15 will need an articulated reason for admitting it.  
16 Otherwise I'm going to preclude it.

17 MS. CHAPMAN: Okay.

18 THE COURT: I expect without needing to  
19 vocalize it with regard to any particular picture that we  
20 can -- the State is likely to crop these in a fashion that  
21 exclude body parts for which normally there is covering in  
22 privacy.

23 MR. BUTNER: Exactly. And just for the record  
24 what we're taking about at this point, Judge, is  
25 Photograph 99.

1 THE COURT: 2992.

2 MR. BUTNER: 2992 off of -- I forget the disk  
3 number.

4 MS. CHAPMAN: Disk C.

5 THE COURT: C.

6 MR. BUTNER: 2992, yes, it would be cropped to  
7 cover the victim's lower portion of the torso and her  
8 upper portion of the torso but leaving her arm in the  
9 picture with this rod like object and the ME's hand in the  
10 photograph.

11 THE COURT: Same true of 2991?

12 MR. BUTNER: Exactly, same true of that.

13 THE COURT: In terms of gruesomeness if that's  
14 done, I don't know find that either 2992 or 2991 are  
15 gruesome.

16 MS. CHAPMAN: So we would --

17 THE COURT: 2990.

18 MR. SEARS: Can you tell us without Dr. Keen  
19 what has been done to that wound and why that photograph  
20 is necessary?

21 MR. BUTNER: I cannot.

22 MR. SEARS: I think that it is particularly  
23 gruesome. It may have some forensic or medical basis but  
24 if we don't have it today, I would object.

25 THE COURT: Well, I think that basically 2990

1 is prima facie gruesome and, again, I would need some  
2 additional foundation laid or some understanding of what  
3 the probative value is, if any, to allow it to be used in  
4 the fashion in which the whole picture is showing. There  
5 may be some things that could be done to redact portions  
6 of it to make it more acceptable to the defense and to the  
7 Court.

8 MR. SEARS: Your Honor, on the next page 2997,  
9 2995, and 29944 (sic). Particularly 29 --

10 THE COURT: 2994.

11 MR. SEARS: 2995 and 2997 the State has  
12 indicated are -- I remember Dr. Keen's testimony about 995  
13 as being his attempt to put pieces of the skull back  
14 together. It's not a scientific exercise. He actually  
15 talked about putting Steroform in the skull. In view of  
16 the more professional work done by Dr. Fulginiti, this is  
17 a particularly gruesome photograph, particularly since it  
18 depicts the victim's ear and her hair and doesn't add  
19 anything of probative value to the case.

20 In 2997 I remember some testimony from  
21 Dr. Keen about that but that is, thus far, the most  
22 gruesome picture that I've see in among those and absent  
23 foundation from Dr. Keen here this morning, I would ask  
24 the Court to make some rulings with respect to the  
25 gruesomeness of 997 and 995.

1                   994 is a picture of hands and an Odontology  
2 scale and there's discoloration and maybe a laceration but  
3 it is so unclear that all it does is just show in a  
4 gruesome fashion the victim's head with nothing of any  
5 probative value.

6                   Again, unless the State is prepared to make an  
7 offer on 994 as to what that depicts and why it's relevant  
8 and why it's necessary --

9                   THE COURT: 2994 I don't have find especially  
10 gruesome. 2995 and 2997 I could find gruesome and would  
11 not admit them until there's some probative value that  
12 outweighs the prejudicial effect and I think that I need  
13 testimony with regard to that. So I'll find prima facie  
14 they are gruesome.

15                  MR. BUTNER: And just to clarify the record I  
16 believe that in regard to Photo 2994 that depicts one more  
17 separate blow to the victim's head.

18                  MR. SEARS: Oh. This one?

19                  THE COURT: 3000, 3001, 299.

20                  MR. SEARS: 3000 and 2998 are the ones marked  
21 on this page. And I think that if 3000 were cropped -- I  
22 think it's an attempt to show injuries to the mouth.

23                  THE COURT: Uh-huh.

24                  MR. SEARS: And perhaps the jaw but I don't  
25 think there is any need to show the victim's upper torso

1 or her nose in 3000, and unless this photograph were  
2 cropped, I think that it is unnecessarily gruesome and not  
3 descriptive of anything that the jury would need to see.

4           On 2998 that is, again, another dissection  
5 photograph. I can't in any way tell the Court that I know  
6 what that is. The victim didn't sustain, to my  
7 understanding, any internal injuries to the -- other than  
8 to the skull. I can't tell looking at that what that  
9 depicts but to the extent that there is the typical  
10 dissection of the torso and the abdomen and all of the  
11 other parts for which there are injuries, I think all of  
12 those are -- I understand why they're photographed but  
13 they are relevant and they are exceedingly gruesome and  
14 absent some foundation that explains to the Court what  
15 2998 is I think we today find that to be gruesome and  
16 inadmissible.

17           MR. BUTNER: Just to clarify on 2998 I  
18 remember what Dr. Keen testified about in regard to this,  
19 and that was that this particular photo, and others like  
20 it, show the injuries to the base of the skull of the  
21 victim, and the fact that bones were shattered down in the  
22 bottom of her skull and pulling -- she's pulling the top  
23 part of the skull back to demonstrate that fact in this  
24 particular photograph.

25           These other photos across the page, so to

1 speak, and you'll get to them in a moment, are the pieces  
2 of skull that were extracted from down in there  
3 (indicating). Some of the pieces and some of the other  
4 pieces I think. That's why I think that photo is  
5 necessary.

6 THE COURT: 3000 I don't find to be gruesome.  
7 2998 I find to be prima facie gruesome. I  
8 think that they're an unnecessary. I think that there can  
9 be description without showing that intimate detail to the  
10 jury. So I would preclude 2998 unless you make some real  
11 showing of necessity at the time of the trial or for that.

12 MR. BUTNER: And I'll just take this one  
13 (indicating) instead of that one (indicating) because and  
14 when I say this one --

15 THE COURT: This one is 3004, is the bone  
16 fragments from the base of the skull.

17 MR. BUTNER: That's my understanding.

18 THE COURT: So --

19 MR. BUTNER: I don't know if there was an  
20 objection even to that.

21 MR. SEARS: I don't have a gruesomeness  
22 objection to that.

23 THE COURT: So no gruesomeness ruling on 3004?

24 MR. SEARS: Correct.

25 THE COURT: 3004 is admissible on the only



1 grounds that we're dealing with today which is the  
2 gruesomeness.

3 MR. SEARS: We don't have any objection to  
4 3007 or 3006 on gruesomeness grounds subject to the  
5 State's assurance that any unnecessary portions of the  
6 victim's body would be cropped out of these photos. I  
7 can't clearly see what's being shown there. I can see,  
8 for example, 3008 which is a portion of her right breast  
9 but I don't see that same portion in 06 or 07.

10 THE COURT: Accounting possibly for the  
11 selection. So 3006 and 3007 are admissible on  
12 gruesomeness grounds.

13 MR. BUTNER: Before we move along I was just  
14 getting a point of clarification, if I may, to go back to  
15 3000 -- I hadn't had 3001. It was 3000 that I had tabbed.  
16 And the Court ruled that that was not gruesome as I  
17 understood?

18 THE COURT: Correct. 3015, assuming that you  
19 can crop that, I would not find it to be gruesome.

20 MR. SEARS: And we have no objection subject  
21 to appropriate cropping or -- and that's the only one that  
22 you're not offering, 14.

23 MR. BUTNER: Okay.

24 MR. SEARS: On -- are we on the same disk now?

25 MS. CHAPMAN: R.

1 MR. SEARS: R, as in Roger, there's -- let's  
2 see, three photographs on this page 004, 003, and 002. My  
3 understanding of the purpose of these photos, these are  
4 from the event a number of days post-autopsy where a golf  
5 club was brought in and positioned against the victim's  
6 arm and the victim's body was brought out in a body bag.

7 I would object. I don't know how you crop  
8 these photos. The sole purpose of these photos, as I  
9 understand them, if there's any probative value, these  
10 photos being these three items matching, it is to show the  
11 linear abrasions on her right arm and the area on her  
12 right biceps or right arm above the elbow with respect to  
13 the golf club.

14 Obviously, we're going to have many objections  
15 to the fact of the golf club if the purpose of these  
16 photos -- they are extremely disturbing and gruesome  
17 because they show the standard Y incision and, of course,  
18 the victim's nude body. Some of these show the victim's  
19 -- this one photograph -- well, it's not being offered.

20 I don't know how you would crop these  
21 photographs to completely cover the Y incision because of  
22 the position of the arm, and unless the State can  
23 demonstrate here today how they would do that and  
24 considering what these photos would be offered for, I  
25 would object to all three of these as being exceptionally

1 gruesome photos.

2 MR. BUTNER: Let's just say I'm offering all  
3 four then, Mr. Sears --

4 MR. SEARS: Okay.

5 MR. BUTNER: -- just for clarification.

6 MR. SEARS: The fourth would be 0001.

7 MR. BUTNER: So it's 0001, 0002, 0003, 0004.

8 And, of course, the purposes is to demonstrate how a golf  
9 club would likely be the instrument that caused these  
10 types of injuries apparent on the victim's body as, in  
11 essence, analyzed by the ME. He being the one that  
12 suggested that a golf club was a likely type of instrument  
13 that caused those injuries.

14 I think, with the cropping, as I'm sort of  
15 doing with my hands right now on that one picture 001,  
16 that we could demonstrate that such an instrumentality as  
17 a golf club might have caused the injury and still protect  
18 the victim's privacy as much as possible -- and let me  
19 look the at 0003.

20 THE COURT: Okay. My finding would be on  
21 0001, 2, 3 and 4, respectively, that if appropriately  
22 cropped they would not be gruesome. If they are not  
23 cropped, they would be and so I'll direct that if you  
24 intend to use those, they be cropped in a position that  
25 would exclude the Y incision, the common place in

1 autopsies.

2 MR. SEARS: And just to be clear so that -- if  
3 we can go back to these, that we would have a number of  
4 others objections because the body has changed  
5 significantly over time and injuries and things are  
6 different than they appeared at the time of death and the  
7 time of autopsy.

8 THE COURT: Only dealing with the gruesome  
9 decision.

10 MR. SEARS: Right.

11 MR. BUTNER: Before we go back to that, just  
12 as a point of clarification, conferring with my assistant  
13 beside me, and she being sophisticated in the ways of  
14 cropping and brushing on a computer, she said in regard to  
15 -- for example, this one right here (indicating) we could  
16 brush this autopsy incision away.

17 Would that be appropriate as decided by the  
18 Court?

19 THE COURT: Yes.

20 MR. BUTNER: Okay. Thank you.

21 MR. SEARS: We're now looking at -- on Page  
22 there's 007 and 006 which are photographs, again, at this  
23 post-mortem reconstruction and the problem with these  
24 photographs and the reason they are extraordinarily  
25 gruesome is that the victim's face is severely distorted

1 not from the injuries but merely has a result of the  
2 autopsy and the changes in skin tension once you reflect  
3 the scalp forward and then pull it back it creates this  
4 ghoulish and ghastly change in the victim's face.

5 Looking at this you can't tell from these  
6 photographs, these two photographs, they're just golf  
7 clubs laid up against the victim's skull. They may have  
8 thought they were depicting something in those photographs  
9 but there's no scale. There's nothing about either of  
10 these photographs that shows anything that could possibly  
11 be of probative of any fact because they cover the injury  
12 and I don't see a way to ever redact these photographs to  
13 leave something there that would be useful to the jury  
14 without at the same time it being unduly suggestive of  
15 what this event was.

16 You know, the Court will hear a great deal  
17 about Macob (phonetic) and the unnecessary nature here,  
18 but we have a real problem with that. And when we get  
19 over to the photographs of 0012, and 0011, again, these  
20 are close-ups of the same event with golf clubs laid up  
21 against the victim's skull.

22 0012 shows the scalp reflected forward.  
23 Again, I think forward. I can't tell. Yeah, I guess it  
24 is based on the shape of the ear. 0011 you can see the  
25 scalp reflected but you can't tell what it was and this is

1 a very clumsy attempt to reconstruct some event and it  
2 focuses on the skull. And 0011 is put back together  
3 again. Perhaps these are very troubling photographs and  
4 because they add nothing to the event they are just  
5 gratuities and gruesome in on our view and we would  
6 object.

7 MR. BUTNER: Actually, I would like to suggest  
8 that the State would offer all four here on 0010.

9 THE COURT: 9, 10, 11, and 12.

10 MR. BUTNER: And 008 also. So I'm assuming  
11 you have the same objection to all of those?

12 MR. SEARS: We do.

13 MR. BUTNER: I would address those as follows,  
14 this is the ME demonstrating in each one of the these  
15 separate injuries to the skull. First, he shows the  
16 injury, then he shows how the golf club fits that  
17 particular injury. Again, he shows the injury, how the  
18 golf club fits the injury. The injury, how the golf club  
19 fits the injury, and each one of those.

20 And I would think that with -- and  
21 understanding the nature of the depiction of the victim's  
22 face, with a cropping that I'm sort of demonstrating right  
23 here (indicating) to the Court, obscuring the victim's  
24 face, that it would be possible and maybe even we could do  
25 a cropping where we obscure in a kind of a box-type

1 fashion the victim's ear and the victim's face and we just  
2 show the ME with the golf club by the injury to the skull.

3 The golf club is similar to any type of  
4 instrument that caused that particular injury and I think  
5 we can do that with each of these photos. Sort of trying  
6 to demonstrate that for the record here. And I think that  
7 if, given the effort of the ME and his fashion, that I  
8 think these are appropriate in a scientific way to  
9 demonstrate that very likely, because of the manner in  
10 which the golf club fits the injury, that a golf club was  
11 the likely instrument that caused these injuries.

12 THE COURT: Well, I think my ruling would be  
13 on these as they currently exist would be unduly gruesome  
14 for purposes of the trial. If they are redacted and  
15 pertinent to testimony by Dr. Keen, they could be  
16 admissible if appropriately cropped, but as they currently  
17 exist, I wouldn't allow them.

18 The point it seems for the instruction of the  
19 photographs would be to show the possibility of the golf  
20 club being a golf club of a similar type being the source  
21 of the injuries. I think you can get that through  
22 testimony without doing a show-and-tell with the jury  
23 whether it's otherwise a reflected scalp in the condition  
24 of the body that it existed post-mortem.

25 So at this point I think that they're

1 unfairly, unduly and prejudicially gruesome. So as they  
2 currently stand I would not allow it and I would make the  
3 same ruling with regard to 1315 and 16.

4 MR. SEARS: And perhaps 17, Your Honor?  
5 That's this one (indicating).

6 THE COURT: And 17.

7 MR. BUTNER: Judge, if we might hold on these  
8 photographs for a moment because it seems to me that these  
9 are extremely important photographs, and I'm particularly  
10 looking at photographs 0016, 0015, and 0017 because the ME  
11 is able to take the golf club and put it next to the skull  
12 of the victim and demonstrate that there is an almost  
13 exactly the same curvature to some of these fracture lines  
14 as that of the golf club and --

15 THE COURT: So if appropriately redacted --  
16 that's why I said --

17 MR. BUTNER: Okay.

18 THE COURT: -- as they currently exist I think  
19 that they are unduly gruesome. If they are redacted in a  
20 fashion that modifies the photograph and could demonstrate  
21 that in a way, that's not gruesome in a prejudicial way,  
22 I'm not -- I think that there is a possibility with  
23 appropriate foundation that they could be used.

24 MR. SEARS: If I can just tell you -- I know  
25 we're not talking about this today but our investigation



1 has let us to believe that there are some real  
2 foundational problems with this experiment being conducted  
3 on the skull after the autopsy. We'll take up and that  
4 may address the gruesomeness question head on.

5 THE COURT: So to speak. In all four?

6 MR. BUTNER: Yeah. I think that -- I think  
7 this was just for identification purposes, again, because  
8 of the body bag and the tags and so forth and that's why I  
9 just went like that (indicating) I'm not going to be  
10 offering these photographs other than for identification  
11 purposes which I think is not going to be an issue now.

12 MR. SEARS: This being 0821, 22, 23 and 24?

13 MR. BUTNER: Right.

14 MS. CHAPMAN: Were now referring to T.

15 MR. SEARS: T as in Tom.

16 MR. BUTNER: Yes.

17 THE COURT: So you don't mind that they'll be  
18 offered?

19 MR. BUTNER: No. I'm trying to clarify the  
20 record. I don't hear anything from the defense. We won't  
21 have an identification issue here in terms of this being,  
22 you know, the victim being taken to the ME and an autopsy  
23 conducted there and that sort of thing.

24 MR. SEARS: I think that's extremely unlikely  
25 and appropriate.

1 THE COURT: This is Disk T 821, 822, 823, 824.  
2 The State does not believe they will be offered unless  
3 there is a dispute about identity in which case I haven't  
4 made a ruling yet with regard to gruesome.

5 MR. BUTNER: We've got a bunch more -- -

6 THE COURT REPORTER: I can't hear you,  
7 Mr. Butner.

8 MR. BUTNER: We have a bunch of photographs  
9 that pertain to Dr. Fulginiti -- I apologize -- and I  
10 think that I just went and tabbed at that point and said,  
11 whoa, you know, we have a whole bunch. We just took a  
12 look at these in mass, so to speak.

13 MR. SEARS: Do you want to keep on going?

14 THE COURT: Finish what we can.

15 MR. SEARS: Okay. We are now on Desk -- on  
16 Disk T 0834 and 0835 are as best I can term it autopsy  
17 photos taken fairly early in the stage based on the amount  
18 of the hair. The 0835 I think would require to be  
19 cropped. You can see a portion of the victim's neck and  
20 shoulders that's unnecessary.

21 And in 0834 you can see, again, the victim's  
22 ear and this seems to be a photograph taken of the same  
23 large laceration. I think that must be the victim's left  
24 ear looking at the same injury at a different angle and,  
25 of course, we're not talking about cumulative photographs,

1 but I think that cropped or uncropped 834 is particularly  
2 gruesome and an unnecessary photograph.

3 And 835, again, seems to be cumulative but you  
4 can't see the scale very well. The photograph is taken  
5 from some distance and to the fact that you can see a  
6 portion of the victim's -- what appears to be the  
7 victims's neck and back, I think it's an appropriately  
8 gruesome photo and I would object to 835 on that ground.

9 THE COURT: MR Butner.

10 MR. BUTNER: Judge, 835 is one of those  
11 separate discreet injuries that we mentioned before and I  
12 don't think it's depicted in any other photographs.  
13 Certainly, we can crop it so that the victim's face or  
14 neck area is not in the photograph and I don't think that  
15 it's gruesome beyond that point.

16 THE COURT: Well, I don't particularly see the  
17 gruesomeness on 835. What about 4?

18 MR. BUTNER: 834, I think that that also can  
19 be cropped to simply show the injury. I'm not sure if  
20 that's the same injury as what was depicted in some other  
21 photos of injury right by the left ear. If it is, of  
22 course, it would be duplicated of those and would not be  
23 used because it's going to be cumulative.

24 THE COURT: Well, I think 834 seems prima  
25 facie gruesome and it appears also covered by other

1 photographs. Although, as you say I am less certain as to  
2 that but I think it was one of your earlier photographs as  
3 well.

4 So I think that 834 is gruesome and it won't  
5 be allowed absent some real showing of need at the time  
6 and distinction from the photographs that are already in  
7 evidence.

8 MR. SEARS: This is Disk 27 and if I  
9 understand this, the State would propose all four  
10 photographs on this page?

11 MR. BUTNER: Correct.

12 MR. SEARS: Okay. 3704 is a photograph at  
13 autopsy looking directly at the victim's face. We have,  
14 and you can see injuries to her right eye, to her mouth  
15 and chin, and then the injury above her left eye and to  
16 her left eye those and the bridge of her nose, and there  
17 are other photographs already looked at that show, that is  
18 a particularly disturbing particular photograph because  
19 you also can't tell from this photograph what has been  
20 done.

21 This appears to be an incision line perhaps  
22 and her -- I just can't tell what this injury is or that  
23 might be the edge of a wound on her scalp but this is a  
24 particularly troubling and unnecessary photo because it  
25 shows the victim in full frontal view in death and if the

1 purpose of the photo is to show the injuries, each of  
2 these injuries have been documented in a far less gruesome  
3 and troubling way in other photographs.

4 THE COURT: I would not find 3704 to be  
5 especially gruesome. I'll reserve the issue of whether  
6 it's cumulative since I don't know to the extent that it  
7 may be offered versus other similar photos being offered.

8 MR. SEARS: 3703 seems to be, yet, another  
9 photo of this same laceration but here you can't tell from  
10 identifying photos. I think it's particularly gruesome,  
11 not probative or anything, probably also cumulative and  
12 the scales don't appear to be put in any particular place  
13 that would measure the wound itself.

14 3713 and 3715 show the skull with the scalp  
15 reflected and exposed bone and would appear to be missing  
16 pieces of skull. I think that those are gruesome in and  
17 of themselves and I think they are unnecessary for some of  
18 same reasons that we've talked about with respect to some  
19 other photographs of the skull and I think they are much  
20 less gruesomely depicted in photographs taken by  
21 Dr. Fulginiti for the purpose to show fractures of the  
22 missing pieces.

23 THE COURT: Mr. Butner.

24 MR. BUTNER: In regard to the Photograph 3703  
25 I believe that's another injury to the head that we have

1 not depicted in photographs as yet and that's the reason  
2 that it is depicted.

3 I don't think it's gruesome because it's  
4 isolated so that you don't see the victim's face or  
5 anything like that but you are able to see the nature of  
6 the injury or injuries and I'm not exactly sure there  
7 maybe more than one here and will be necessary for  
8 Dr. Keen to testify about those particular injuries.

9 Should I going on to each one of these?

10 THE COURT: Yes.

11 MR. BUTNER: In regard to Photographs Number  
12 3713 and 3715 those photographs depict the number of  
13 fractures and pieces in which the victim's skull was  
14 reduced to, so to speak, as a result of the attack and  
15 it's an effort by the ME to show those injuries and the  
16 full extent of those injuries and it's true the skin is  
17 reflected away to demonstrate the injuries with the pieces  
18 kind of held together in place. I think that's necessary  
19 for the ME's testimony from a scientific basis.

20 THE COURT: I think 3703 to 3715, 3713 are  
21 prima facie gruesome not especially probative of any  
22 particular fact at issue and I think that other  
23 photographs with Dr. Fulginiti's assessment may provide  
24 the same and so I'm going to prima facie find that they're  
25 inflammatory and prejudicial and I think that there are

1 other photographers that could be substituted in instead  
2 of those.

3 MR. BUTNER: For identification purposes as  
4 opposed to those ones --

5 THE COURT: You're not intending to --

6 MR. SEARS: I promise you we will not.

7 MR. BUTNER: Okay. Thank you.

8 MS. CHAPMAN: So this is just 35 now.

9 THE COURT: Thank you.

10 MR. BUTNER: And I don't know for sure how  
11 Dr. Fulginiti testifies. I have never had her on the  
12 stand but I have all of these tabbed and for the record --

13 THE COURT: Numbers.

14 MR. BUTNER: -- they are going to be 0246 --  
15 no. I got the wrong number. I got letters.

16 MS. CHAPMAN: Well, this is 0246 Y, 014, and  
17 this is 0246, maybe that's a V instead of Y 013, and then  
18 there's also 0246, 015, and 0246, 016.

19 MR. BUTNER: Okay. So I would just call them  
20 014, 013, 015, and 016. They're offered to demonstrate  
21 apparently the process necessary in order to get to where  
22 Dr. Fulginiti can make her conclusions and to that extent  
23 that's my understanding of how they are necessary.

24 THE COURT: 13, 14 and 15 I would find  
25 especially gruesome and probably not sufficient probative

1 to authorize them. That may even be true of 016. I would  
2 need some showing through you and Dr. Fulginiti as to why  
3 that might be necessary.

4 I don't think that the process itself is  
5 necessarily important for the jurors. I think that to see  
6 a blow-by-blow sort of way, I think they can perhaps have  
7 some other exhibits that show the final conclusions based  
8 on her evaluation.

9 MR. BUTNER: All of the remainder of the  
10 photographs I am offering. I just didn't bother to go in  
11 and tab them because they are of the boiled, for the  
12 record, the boiled skull of the victim devoid of flesh and  
13 I believe that they show the various pieces and with  
14 measurements, of course, in place and, of course, to some  
15 extent they're probably going to be cumulative and I can't  
16 tell that because I don't know exactly how Dr. Fulginiti  
17 testifies or what she's doing with each one of these  
18 photographs. And I can -- go ahead.

19 THE COURT: In terms of our identifying them  
20 by number they range from the 08246 V 016. All the way  
21 through then -- through to 054?

22 MR. SEARS: Actually there is 013.

23 MR. BUTNER: Those will be --

24 THE COURT: But 16 I also made a preliminary  
25 ruling on but basically it's 17 and then sequentially it



1 looks like all the way through the last one being 054.

2 MR. SEARS: Are there any gaps in the  
3 numbering?

4 MR. BUTNER: I don't know.

5 MR. SEARS: Yeah, there are because it jumps  
6 from 025 to 026 but then there's 034, 035. So there are  
7 gaps in numbering. Number of photos missing.

8 MS. CHAPMAN: Well, 24 is missing. Unless  
9 it's some place else.

10 MR. SEARS : 25?

11 THE COURT: Okay. So to be more clear on the  
12 record it goes from 16 through 23, skips to 4, and then it  
13 goes 25, 26, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44.  
14 All the way through 50. It skips 51 it looks like. And  
15 then it has 52, 53, 54.

16 MR. SEARS: I don't have any gruesomeness  
17 arguments with the possible exception of 17, seems to be  
18 just a slightly different shot or maybe an identical shot  
19 to 16 which the Court found could possibly be prima facie  
20 gruesome without additional foundation and part of the  
21 process and unnecessary problematic in other areas. With  
22 respect to the rest of these I don't think that I can see  
23 anything with respect to gruesomeness.

24 THE COURT: All right. Clearly, there may be  
25 some other objections such as cumulative and the like?

1 MR. SEARS: Well, we don't even know the  
2 purpose for starters.

3 MR. BUTNER: Technical more than anything.

4 MR. SEARS: Likely.

5 MR. BUTNER: Well, that's what she told me at  
6 some point, I was going to say on the phone, but I think  
7 she told me in person, but I can't remember now.

8 MR. SEARS: Okay.

9 THE COURT: All right. That takes care of the  
10 photos.

11 MR. BUTNER: Thank you.

12 MR. SEARS: Thank you, Your Honor.


13 MS. CHAPMAN: Thank you.

14 MR. SEARS: Thanks for everybody for staying.  
15 (Whereupon, the proceedings were concluded.)  
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## R E P O R T E R ' S   C E R T I F I C A T E

I, Lisa A. Chaney, a Certified Reporter, in the State of Arizona, do hereby certify that the foregoing pages 1 through 82 constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 28th day of January, 2010.



LISA A. CHANEY, RPR, CSR, CR  
Certified Reporter  
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